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In the Supreme Court of the United States

OCTOBER TERM, 1978

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL LODGE NO. 358, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

ROBERT E. ALLEN,
Acting Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,

DAVID S. FISHBACK,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 26-27) is unpublished. The decision and order of the National Labor Relations Board (Pet. App. 28-131) are reported at 226 NLRB 788.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1978. The petition for a writ of certiorari was filed on July 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that an employee was discharged because he refused to work and not because of anti-union animus.

2. Whether substantial evidence supports the Board's finding that the employee's practice of not working was not a condition of employment that could only be changed through collective bargaining.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at Pet. 2-5

STATEMENT

1. Petitioner (herein "the Union") has been a party to collective bargaining agreements covering employees at the American Ship Building Company's Lorain, Ohio, shipyard since the early 1940's (Pet. App. 49). The Union's presidents, since approximately 1950, have been permitted to tend to union business during working time. Thus, traditionally the Union president would report to his supervisor at the beginning of his shift. When summoned for union business, he requested permission, which was invariably granted, to attend to such business. When necessary, the president would be required to finish the job at hand or wait until a replacement arrived before leaving his work. Typically, the Union president spent 1 to 4 compensated hours during work hours each day on union business (Pet. App. 53).

When Harvey Krieg became president of the Union in July 1972, he initially operated within the established practice (Pet. App. 53-54). However, Krieg gradually spent a greater and greater portion of his time on union business, until, by late 1972, he was spending all his time

on union business, and did not report to his foreman, William Van Horn, at the beginning of his shift (Pet. App. 54-55). On June 7, 1974, following complaints by Van Horn to his superior, the Company ordered Krieg to report to Van Horn at the start of his shift. Krieg did not comply with the order but filed a grievance, which had not been resolved at the time of his subsequent discharge (Pet. App. 55).

On October 11, 1974, Van Horn discovered that he was a man short, and needed Krieg to complete a four-man unloading crew. He found Krieg in the dispatcher's office reading a newspaper. Krieg told Van Horn that he wished to take up a grievance regarding the loading of a ship that had just left on a trial run (Pet. App. 55-56). Van Horn replied that the grievance could be taken up later, but that first Krieg would have to help the unloading crew. Krieg refused, stating that he was "involved in the grievance procedure" (Pet. App. 56-57). Van Horn sought the assistance of Vice President of Operations John Schermond, who supported Van Horn and ordered Krieg to obey his foreman. Krieg walked out on Schermond, who then directed Van Horn to issue Krieg a reprimand for insubordination, which, under Company rules, resulted in discharge (Pet. App. 57).

2. The Board found that the Company did not violate the Act by discharging Krieg. The Board agreed with its Administrative Law Judge that the record did not support the Union's allegation that Krieg had been discharged because of his strong advocacy on behalf of the Union. The Board noted that, while Krieg had been aggressive and successful as union president, there was "no evidence * * * that management built up any hostility towards Krieg or his union because of this" (Pet. App. 58). Indeed, the record showed that the Company had had an association with petitioner and other unions at the Lorain location for many years, and that "[o]ther than expressions

of disagreement and exasperation normally characteristic of the arms-length bargaining relationship there is no substantial probative evidence of any desire by the [company] to deprive its employees of representation by the Union or unions of their choice, * * * or of other anti-union animus" (Pet. App. 59-61). The Board therefore concluded that the Company did not violate Section 8(a)(3) of the Act because "the record fails to support the * * * contention that Krieg's discharge was motivated by anti-union considerations" (Pet. App. 58).

The Board, however, disagreed with the Administrative Law Judge's conclusion that the discharge violated Section 8(a)(1) and 8(a)(5) of the Act, 29 U.S.C. 158(a) (1) and 158(a)(5), because "Krieg's nonwork for 2 years with full knowledge of the Employer rose to the level of an existing working condition, established through custom and practice, which could not be changed without bargaining with the Union" (Pet. App. 30).[1] The Board noted that nothing in the collective bargaining agreement permitted Krieg to decline work assignments, and that there was no evidence that during the two year period he had ever been ordered to work or that the Company had assumed he would not work if so ordered. The Board stated that "[s]omething more affirmative is needed to establish that an employer has waived its right to require an employee to perform work for which he was hired and for which he was nominally being paid" (Pet. App. 31). Moreover, the Board concluded that the fact that, four months prior to the discharge, the Company had ordered Krieg to report to his foreman at the start of his shift (the normal practice for other employees) demonstrated that the Company "did not intend such a waiver" and that "Krieg was therefore on notice well before his discharge that he was expected to work when ordered to do so" (Pet. App. 31-32).

[1]The Board stated (Pet. App. 30-31): "By this logic, Respondent would have had to bargain with the Union for Krieg's services before ordering him to perform work for which he was being paid and before discharging him for failure to obey such an order."

The court of appeals affirmed the Board's order without opinion (Pet. App. 26-27).

ARGUMENT

1. The Union contends (Pet. 8-20) that the Board erred in finding that Krieg's discharge was not motivated by anti-union animus. That question raises only an evidentiary issue that does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-491.

In any event, there is ample support in the record for the Board's decision. The Union relies primarily on Company Board Chairman Steinbrenner's alleged remark the preceding year that "[t]hose that cooperate with me, I cooperate with one hundred per cent and those that don't, I take care of" (Pet. 9-10). However, as the Law Judge noted (Pet. App. 59): "This statement was made, if at all, a long time ago in a discussion of an issue, apparently not thereafter pressed by the Company."[2]

[2]The Union also appears to contend (Pet. 14, 20) that Krieg's discharge violated Section 8(a)(1) because Krieg was allegedly entitled (presumably under the collective bargaining agreement) to refuse to work because he was allegedly processing a grievance. That contention is also belied by the record. The grievance did not require immediate attention since the ship at issue had left the yard and since, as the Board noted (Pet. App. 32), "under the contract the Union had 7 more days in which to press the grievance." Under the circumstances, therefore, Krieg had no right to refuse Van Horn's order to work and defer the grievance.

Petitioner's reliance (Pet. 20) on *Southwest Latex Corp.* v. *National Labor Relations Board,* 426 F. 2d 50 (C.A. 5), for the proposition that discharge of an employee "engaged in protected activity at the time of his discharge" is *a fortiori* unlawful is without merit. That case, in which the court of appeals denied a Board request for enforcement of a decision finding an unlawful discharge, simply stated that to find illegality "it must be shown that the employer knew that the employee was engaged in protected activity and that the employer fired the employee because of such activities." *Id.* at 56. Here, of course, the Board found that Krieg's protected activity in no way motivated his discharge.

2. The Union also argues (Pet. 21) that Krieg's self-appointed status as a nonworking employee had become a condition of employment that could only be changed by bargaining. That claim is insubstantial. As the Board noted (Pet. App. 34 n. 2):

> [T]he custom and practice in existence for some 20 years prior to Krieg's ascendancy to the presidency was for employee union presidents to spend only half their day on union affairs and the other half working. Krieg's encroachment upon this deeply rooted practice cannot eliminate what had existed for 20 years.

Moreover, that fact that Krieg was expressly directed to work four months before his discharge refutes the suggestion that the employer had accepted his nonwork practice as a condition of employment. The Board's finding is thus amply supported by the record and does not, in any event, warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

ROBERT E. ALLEN,
Acting Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,

DAVID S. FISHBACK,
Attorney,
National Labor Relations Board.

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